

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

**TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS**

**BEFORE THE HONORABLE AMY TOTENBERG**

**UNITED STATES DISTRICT JUDGE**

**AUGUST 27, 2019**

**10:33 A.M.**

***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

***TRANSCRIPT PRODUCED BY:***

<b>OFFICIAL COURT REPORTER:</b>	<b>SHANNON R. WELCH, RMR, CRR</b>
	<b>2394 UNITED STATES COURTHOUSE</b>
	<b>75 TED TURNER DRIVE, SOUTHWEST</b>
	<b>ATLANTA, GEORGIA 30303</b>
	<b>(404) 215-1383</b>

UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

**FOR THE PLAINTIFFS DONNA CURLING, DONNA PRICE, JEFFREY  
SCHOENBERG:**

DAVID D. CROSS  
MORRISON & FOERSTER, LLP

ADAM M. SPARKS  
KREVOLIN & HORST, LLC

**FOR THE PLAINTIFF COALITION FOR GOOD GOVERNANCE:**

BRUCE BROWN  
BRUCE P. BROWN LAW

ROBERT A. McGUIRE III  
ROBERT McGUIRE LAW FIRM

**FOR THE STATE OF GEORGIA DEFENDANTS:**

VINCENT ROBERT RUSSO, JR.  
CAREY A. MILLER  
JOSHUA BELINFANTE  
KIMBERLY ANDERSON  
BRIAN LAKE  
ROBBINS ROSS ALLOY BELINFANTE LITTLEFIELD, LLC

BRYAN P. TYSON  
BRYAN JACOUTOT  
TAYLOR ENGLISH DUMA

**FOR THE FULTON COUNTY DEFENDANTS:**

CHERYL RINGER  
DAVID LOWMAN  
OFFICE OF THE FULTON COUNTY ATTORNEY

(...cont'd...)

1 (...cont'd....)

2

3 **FOR THE OBJECTORS CARE IN ACTION, INC., ET AL:**

4

DARA LINDENBAUM  
SANDLER REIFF LAMB ROSENSTEIN & BIRKENSTOCK, P.C.

5

6

KURT G. KASTORF  
THE SUMMERVILLE FIRM, LLC

7

8

**ALSO PRESENT:**

9

10 J. ALEX HALDERMAN, Ph.D.  
11 MARILYN MARKS

12

13

14

15

16

17

18

19

20

21

22

23

24

25

**P R O C E E D I N G S**

**(Atlanta, Fulton County, Georgia; August 27, 2019.)**

COURTROOM DEPUTY CLERK: Good morning, everyone.  
We're here for a teleconference in Curling vs. Raffensperger,  
Civil Action Number 17-CV-2989.

Beginning with the Curling plaintiffs, would counsel  
please make their appearance for the record.

MR. TYSON: Mr. Martin, this is Bryan Tyson for the  
state defendants. I have seen a couple of emails from  
Mr. Cross and Mr. McGuire that the access code was not working  
correctly for them. So I'm not sure there is anybody from the  
plaintiff that is on the phone.

COURTROOM DEPUTY CLERK: Okay. Thank you. Let me go  
and check that out real quick.

**(There was a brief pause in the proceedings.)**

LAW CLERK COLE: Counsel, this is Ms. Cole. Is  
everyone on the line now?

MR. CROSS: David Cross is on for Curling plaintiffs.  
I think our expert, Dr. Halderman, may dial in any minute. I  
just sent him the correct code.

**(There was a brief pause in the proceedings.)**

COURTROOM DEPUTY CLERK: Okay. Let's try this again.  
We are here for the teleconference in Curling vs.  
Raffensperger, Civil Action Number 17-CV-2989.

Beginning with the Curling plaintiffs, would counsel

1 make their appearance for the record.

2 MR. CROSS: Good morning. This is David Cross from  
3 Morrison Foerster. And also on the line is Dr. Alex Halderman.

4 MR. BROWN: This is Bruce Brown for the Coalition  
5 plaintiffs.

6 MR. MCGUIRE: This is Robert McGuire for Coalition  
7 plaintiffs, as well. I believe Marilyn Marks is on the line,  
8 as well, for the Coalition as the executive director.

9 COURTROOM DEPUTY CLERK: Thank you.

10 State of Georgia?

11 MR. RUSSO: Vincent Russo with Robbins Ross Alloy  
12 Belinfante Littlefield.

13 MR. TYSON: And Bryan Tyson with Taylor English,  
14 along with Bryan Jacoutot.

15 MR. RUSSO: And I have here with me Kimberly  
16 Anderson, Josh Belinfante, Carey Miller, and Brian Lake.

17 THE COURT: Thank you.

18 COURTROOM DEPUTY CLERK: Fulton County?

19 MS. RINGER: Good morning. Cheryl Ringer and David  
20 Lowman.

21 COURTROOM DEPUTY CLERK: Thank you.

22 Did anyone else just join recently?

23 MR. SPARKS: Yes. This is Adam Sparks with Krevolin  
24 & Horst for the Curling plaintiffs.

25 MR. KASTORF: This is Kurt Kastorf with the

1 Summerville Firm. I represent some nonparty subpoena targets  
2 who are also plaintiffs in the Fair Fight litigation.

3 COURTROOM DEPUTY CLERK: I'm sorry. State your name  
4 again, please.

5 MR. KASTORF: Kurt Kastorf.

6 COURTROOM DEPUTY CLERK: Spell your last name,  
7 please.

8 MR. KASTORF: K-A, S like Sam, T like Tom, O, R like  
9 Roger, F like Frank.

10 THE COURT: This is Judge Totenberg. Is that -- has  
11 everyone on the phone announced themselves?

12 MS. LINDENBAUM: This is Dara Lindenbaum. I also  
13 represent a number of the third parties that received  
14 subpoenas.

15 COURTROOM DEPUTY CLERK: I'm sorry. State your name  
16 again and spell your last name, please.

17 MS. LINDENBAUM: Dara Lindenbaum,  
18 L-I-N-D-E-N-B-A-U-M.

19 THE COURT: Okay. I'm going to need everyone who is  
20 a third party to immediately email, even if you are just from  
21 your phone, Mr. Martin and indicate your name and who exactly  
22 you are representing. I can't proceed with your just not  
23 having identified yourself in advance. And I'm not expecting  
24 you to put it on the docket at this late point, though I think  
25 it would have been a courtesy to do so and appropriate.

1 But I need you to go ahead and -- do you have  
2 Mr. Martin's email?

3 MS. LINDENBAUM: Yes.

4 THE COURT: So each one of you who is representing a  
5 third party -- one or more third parties needs to go ahead and  
6 email him this moment. Indicate your name, your law firm, and  
7 who you are representing specifically. Not just a third  
8 party -- you can't just say a third party.

9 MR. KASTORF: Understood, Your Honor.

10 THE COURT: Are there any other -- I have now had two  
11 attorneys identify themselves as having been served with a  
12 subpoena. And I'm not really sure what the purpose of your  
13 presence is on the phone calls. But I'm going to start with  
14 you. So that is why I want to know exactly who you are.

15 Is there anyone else here representing a third party?

16 Okay. All right. Meanwhile, of the defendants --  
17 state defendants' counsel who identified themselves, the only  
18 one I actually heard clearly was Mr. Tyson. I heard originally  
19 Mr. Russo clearly. But not or maybe -- maybe not. But there  
20 was a lot of electricity like you were on a -- are you-all on a  
21 speakerphone? Mr. Belinfante and Mr. Russo and at least one  
22 other was unclear.

23 MR. RUSSO: Yes, ma'am. This is Vincent Russo. Is  
24 that -- can you hear me right now?

25 THE COURT: I can hear you. But there is a lot of

1 static. Are you on a speakerphone?

2 MR. RUSSO: We are on a speakerphone in our  
3 conference room. And I'm getting a little bit of echo also.  
4 We can try to call back in.

5 THE COURT: All right. All right. That would be  
6 great. We might not get better than that. I can hear you, but  
7 it is just more annoying than indecipherable.

8 MR. RUSSO: Yes, ma'am. We'll call right back.

9 THE COURT: Thank you very much. We're going to wait  
10 here until we get the emails from the counsel for the third  
11 parties.

12 **(There was a brief pause in the proceedings.)**

13 THE COURT: That's better, Mr. Russo. Thank you very  
14 much.

15 MR. RUSSO: Yes, ma'am.

16 Do you need me to clarify who all is here with me?

17 THE COURT: No. We could hear it. It was going to  
18 make it very unpleasant to listen to you, which we have enough  
19 communication issues without -- without your communication  
20 issues.

21 All right.

22 **(There was a brief pause in the proceedings.)**

23 MR. KASTORF: Your Honor, this is Kurt Kastorf, one  
24 of the attorneys representing the third-party subpoena targets.  
25 I just sent an email to Mr. Martin with my name and who I



1 represent, and it also included Dara Lindenbaum, who is the  
2 other counsel on the call representing those -- the subpoena  
3 targets named in that email.

4 THE COURT: So you are saying that you included the  
5 information for the other third-party defendant also?

6 MR. KASTORF: Yes, Your Honor. Ms. Lindenbaum and I  
7 are both representing the same set of third-party subpoena  
8 targets.

9 THE COURT: I see.

10 MR. KASTORF: So there were subpoenas sent in this  
11 litigation to the plaintiffs -- the named plaintiffs in the  
12 Fair Fight litigation in front of Judge Jones. We received an  
13 email from Mr. Martin notifying us of this telephone  
14 conference. So we joined in case any issues related to those  
15 subpoenas would be discussed.

16 If the Court doesn't need us for anything, we are  
17 happy to get off of the phone. But that is why we called.

18 THE COURT: All right. So I'm sorry. Who served you  
19 with a subpoena?

20 MR. KASTORF: The defendants in this litigation.  
21 I'll need to check the subpoenas to see if it is each of the  
22 named defendants -- but served subpoenas on the various named  
23 plaintiffs in the Fair Fight litigation. And then we filed  
24 objections on behalf of each of those plaintiffs. Those are  
25 Docket Entries 515 through 521 on this docket. And there

1 hasn't been any further movement on that since we filed the  
2 objections.

3 THE COURT: All right.

4 MR. BELINFANTE: Your Honor, this is Josh Belinfante.  
5 It was the state defendants that did so. Just for some  
6 background, as part of that, we received the joint litigation  
7 document. And we had notified the third-party subpoena  
8 recipients that we would put a placeholder on everything until  
9 after the preliminary injunction hearing. And we have not  
10 moved to do anything with the subpoenas since.

11 As we are now trying to determine what is the scope  
12 of discovery going forward, there is no immediate deadline  
13 there given where things stand currently.

14 THE COURT: But you sent them a subpoena in this  
15 case, not in the Fair Fight case?

16 MR. BELINFANTE: That's correct.

17 THE COURT: And is there anything that Mr. Kastorf or  
18 Ms. Lindenbaum need to be present for in this phone conference?

19 MR. BELINFANTE: From the state's perspective,  
20 depending on what the Court, you know, provides in terms of  
21 guidance on the future scope of discovery, I don't think so.  
22 We have actually worked relatively well with the third-party  
23 subpoena recipients. And as of now, there is nothing that we  
24 are saying compels them to produce anything.

25 So depending on how this Court rules, then we may

1 have to go through a meet-and-confer and then revisit the  
2 issue. But even that, Your Honor, has not been fully decided  
3 as the joint defense or -- excuse me -- the joint litigation  
4 document has been produced. And that would raise additional  
5 issues that we're, frankly, not ready to address today.

6 THE COURT: All right. Is there any reason from the  
7 perspective of the -- any of the plaintiffs that Ms. Lindenbaum  
8 and Mr. Kastorf need to participate today?

9 MR. BROWN: This is Bruce Brown. No, Your Honor.

10 THE COURT: From the Curling plaintiffs?

11 MR. CROSS: No, Your Honor.

12 THE COURT: Is that Mr. Cross?

13 MR. CROSS: Yes. Sorry.

14 THE COURT: All right. Mr. Kastorf and  
15 Ms. Lindenbaum, you are not maintaining that you need to  
16 participate, I gather?

17 MR. KASTORF: No. We called in because we received  
18 the telephone conference notice.

19 THE COURT: All right. I think that it simply is on  
20 the docket. That is the -- it is the notice on the docket as a  
21 whole.

22 All right. Well, then you are excused from  
23 participation, and we'll try to get -- in the future make clear  
24 who is needed in a more specific way then.

25 Thank you very much for participating in this long

1 introduction and piece of confusion. I appreciate it.

2 MS. LINDENBAUM: Thank you, Your Honor.

3 THE COURT: All right. So back to square one,  
4 you-all have filed lots of different things about what you want  
5 to talk about today. So it sort of has a little bit ballooned.  
6 It likely will take a little more time than I initially  
7 envisioned.

8 I think that the most fundamental question here is  
9 this about where the case is moving forward and what the status  
10 of discovery is and how -- just the welter of disputes that  
11 exist. Obviously I issued a very long and comprehensive order.

12 Your scheduling order anticipated that there would be  
13 still another trial on the merits in January and a final  
14 decision. It is hard to imagine, frankly, any more litigation  
15 resources being devoted to the current dispute in terms of the  
16 DRE GEMS system as currently configured for a variety of  
17 reasons, but not the least of which is that I think that the  
18 Court has exhausted the resources of looking at this. And I  
19 don't think there is more useful information for purposes of a  
20 trial or more that would be achieved.

21 So I'm trying to understand what would be the purpose  
22 of further discovery at this juncture about this old system. I  
23 understand that there may be some in connection with  
24 implementation of a remedy. But that is the first sort of  
25 piece of confusion. And it is really, frankly, for both sides.

1           On one hand, I see that the plaintiffs are trying to  
2     want discovery more on the DRE equipment. And on the other  
3     side, the defendants appear to want to do more discovery on  
4     Dr. Halderman's card that he used in the first preliminary  
5     injunction hearing.

6           And so I'm just wondering where you-all are going on  
7     both sides because it is hard for me to conceptualize what we  
8     would be dealing with in January even if I said we could  
9     actually proceed in January at this point given the amount of  
10    information that already -- and evidence that has already been  
11    filed and the fact that in some way or form something is going  
12    to move forward.

13           Now, I understand that the plaintiffs and petitioners  
14    who have challenged are seeking to challenge the new system.  
15    But I'm just asking about this system. Are you-all  
16    conceptualizing that you would actually go forward and seek a  
17    full trial on the merits after what we've already gone through?

18           MR. CROSS: Your Honor, this is David Cross for the  
19    Curling plaintiffs. I think for the Curling plaintiffs -- and  
20    Mr. Brown and Mr. McGuire can obviously speak for their  
21    plaintiffs. I think the short answer on that is no, with a  
22    caveat, which is we have asked the defendants a number of times  
23    a couple of important questions that they have declined to  
24    answer.

25           One is will they stipulate to the preliminary

1 injunction as a permanent injunction. If they will, then I  
2 think that certainly resolves any need for a trial on the  
3 merits. But if they are going to refuse to do that, then I'm  
4 not sure where we go. There would have to be some further  
5 proceeding.

6 I certainly agree Your Honor doesn't need any further  
7 evidence to turn that into a permanent injunction. But until  
8 we have a permanent injunction that is either stipulated to by  
9 defendants or is entered by the Court, then it is a live case.  
10 It has to go forward.

11 And if they are going to take the position to keep  
12 open the possibility that they will oppose a permanent  
13 injunction, we have to get discovery to be in a position to  
14 respond to whatever defenses they are going to assert.

15 And related to that, of course, is whether they are  
16 going to appeal. They have not been willing to answer that  
17 either. And that, of course, puts them in the permanent -- I'm  
18 sorry -- the preliminary injunction becomes an open question if  
19 they are going to exercise their appeal on that as well. So  
20 the first point I would make is: As long as they are keeping  
21 their rights open, the case is live and it goes forward.

22 The second point I would make, Your Honor, is there  
23 are aspects of Your Honor's order that are going to require  
24 some amount of cooperation and discovery between the parties.  
25 Dr. Halderman's declaration -- and I apologize. We got it in

1 as quickly as we could. I know it went in late last night.

2 But if you have had an opportunity to just peruse  
3 that --

4 THE COURT: I read it.

5 MR. CROSS: -- he identifies -- great -- he  
6 identifies a number of areas where we think some amount of  
7 discovery will be needed to make sure that prospective relief  
8 is effected.

9 Then the last point I would make, Your Honor, is we,  
10 of course, understand Your Honor's ruling on the 2019  
11 elections. But I would just offer this. It still remains the  
12 fact that no one has ever examined the system despite  
13 Dr. Shamos himself emphasizing a number of ways that that needs  
14 to be done before the election.

15 And so our concern is from a prospective basis just  
16 imagine the situation where the system actually is compromised  
17 and no one knows because no one will look. We believe we do  
18 have a fundamental constitutional right to continue with that  
19 discovery until we've confirmed that.

20 The problem is you've got the Secretary of State  
21 repeatedly telling the public that they have complete  
22 confidence in this system and the voters should have confidence  
23 in the system and it will get used this year.

24 The reality is that the Secretary of State does not  
25 have confidence in the system because, if he did, he would

1 allow Dr. Shamos or Ms. Payton or someone to examine it. We  
2 think that it is important. As Your Honor pointed out in your  
3 own order, as Dr. Shamos emphasized, voter confidence is  
4 critical.

5 They have no basis to oppose the examination in a  
6 live case. And if they are right that the system is fine, then  
7 it is a win-win. Right. We'll confirm that. Voters will  
8 confirm that. They will confirm that. And it can get done  
9 before the 2019 election.

10 If they are wrong, then it doesn't matter what timing  
11 is left. The system cannot be used. And I would hope we would  
12 all agree on that.

13 So it seems there are only two paths forward on this.  
14 One is: They are right. We do this. We get it done, and  
15 everybody wins because voter confidence is confirmed. Or they  
16 are wrong. And no matter if we figure that out a week before  
17 the election, everyone would have to agree that the system  
18 could not be used if it is compromised in a way that affects  
19 the outcome.

20 And so that is where we come down on this, Your  
21 Honor. It is a live case with prospective relief on the  
22 election that is going forward. And to this day, no one has  
23 done what their own experts said needs to get done for voters  
24 to have confidence or even know that the results are going to  
25 count in the way that they are intended.



1 MR. BROWN: Your Honor, this is Bruce Brown for the  
2 Coalition plaintiffs. We would substantially agree with  
3 Mr. Cross' statement. You introduced -- Your Honor, you  
4 introduced the issue by referencing the implementation issues  
5 that are still very much alive. And this is complex, of  
6 course, significant injunctive relief that has a lot of  
7 different aspects to it. The Court has a lot of flexibility in  
8 fashioning relief to meet the equities in the underlying facts.

9 There are open issues with respect to whether the new  
10 system will be certified and will be deployed in time, which  
11 issues will aggravate the problems with the existing underlying  
12 system as being deployable with hand-marked paper ballots.

13 So we believe that -- the other point that I would  
14 make is that the state's position is not that this discovery  
15 that is being sought is burdensome on the state because it is  
16 not. This is forensic discovery, whether it is with respect to  
17 the FBI image server, an issue that we had hoped to have to you  
18 by this conference but was delayed -- and we will submit that  
19 as soon as we can under the joint dispute resolution process --  
20 or the forensic discovery of the servers. This is efforts that  
21 will be undertaken by the plaintiffs.

22 And what we're asking of the defendants is simply to  
23 allow us to do it for the most part. That is not all the  
24 discovery. But that is sort of the most urgent right now that  
25 Mr. Cross has been referring to.

1           And so we agree about the nature of this preliminary  
2 injunction. It has been and is a material alteration of the  
3 relationship between the parties. And in many ways, if it is  
4 not like a TRO, it resembles much more a permanent injunction  
5 already in practical effect. And so the utility of a trial on  
6 these issues -- a formal trial is uncertain.

7           However, given the implementation issues and the  
8 other issues that Mr. Cross mentioned, particularly the lack of  
9 burden on the defendants, this kind of discovery needs to go  
10 forward at this time.

11           THE COURT: All right.

12           MR. RUSSO: Your Honor, this is Vincent Russo for the  
13 state defendants. You asked where is this case going and the  
14 status of discovery. And I think that from our perspective  
15 there is no need to expend additional resources on further  
16 discovery related to the DREs and the GEMS.

17           Your order has laid out what we can and cannot do,  
18 minus the need for clarification on a few issues that we have  
19 raised, which are really more in terms of what we need to  
20 provide to you. There is in our mind nothing else to do here.  
21 And the order is the order.

22           Compliance with the order though does not require  
23 additional discovery. So, you know, while I understand that  
24 the plaintiffs are continuing to go on a mission to get more  
25 information and would like to be able to review everything,

1 there is just no need for that at this point in the case.

2 And we have a motion to -- for leave to amend to file  
3 a third amended complaint as to the BMDs. That is also on the  
4 table for consideration. The case is going and appears to be  
5 going in that direction. But, you know, there is no need for  
6 us to continue to have to address these other -- these other  
7 discovery issues. We had the hearing. And, you know,  
8 compliance with the order does not require further discovery.

9 As to your question about Dr. Halderman and our  
10 request for information about the memory card that was produced  
11 to state defendants, that was simply part of the email chain  
12 and could have -- should have just been ignored. That was more  
13 a result of us leaving that in the email chain instead of  
14 blacking it out. But it was also something that we had  
15 requested prior to the preliminary injunction order being  
16 issued. So that is no longer an issue at this juncture.

17 THE COURT: All right. Well, it seemed to me that  
18 there were two major strands that the plaintiffs were focusing  
19 on. One was the contention that because the elections still  
20 are going on and the case is alive, even if I have already  
21 ruled as to appropriate -- the relief I'm willing to grant at  
22 this juncture, that you -- the plaintiffs' counsel still have  
23 an obligation and right to complete discovery with respect to  
24 the functionality and potential compromise of the hardware and  
25 equipment, if I hear you correctly. And the second issue was

1 with respect to implementation of the remedy.

2 Is that a fair summary?

3 MR. CROSS: This is David Cross. Yes, I think that  
4 is fair, Your Honor.

5 MR. BROWN: Yes, Your Honor.

6 THE COURT: Well, I think that I am going to just --  
7 before we proceed, I'm going to take a few minutes and just go  
8 offline. And I guess, you know, I really didn't know what your  
9 position was. So I need to think about what you are all saying  
10 for a moment. And then we'll resume.

11 All right. So it will be a few minutes.

12 MR. RUSSO: Your Honor, this is Vincent Russo. If I  
13 could just clarify --

14 THE COURT: Sure.

15 MR. RUSSO: -- now that the plaintiffs have clarified  
16 their two positions. Just regarding Number 1, on the  
17 contention that elections are still going on and so discovery  
18 is needed, you know, we don't see what relief the discovery  
19 would lead to at this point in light of the preliminary  
20 injunction -- in the light of the preliminary injunction order.

21 As to the implementation of the remedy, the order  
22 requires certain updates and filings to be made. And that is  
23 merely compliance with the order and not necessarily the need  
24 for discovery. And if their amended complaint goes forward,  
25 then we'll address these BMD issues when the time comes.

1 MR. CROSS: Your Honor, this is David Cross. Could I  
2 just very briefly respond to the first point?

3 THE COURT: Yes.

4 MR. CROSS: The reason why the discovery is important  
5 on the examination that we've requested -- and there are two  
6 respects to it. Mr. Brown pointed out one, which is the KSU  
7 server that we have been trying to get a copy of. And the  
8 other, of course, is the GEMS servers and the DREs that are  
9 still in use -- is because there is an upcoming election.

10 Again, we understand the order that Your Honor  
11 entered. But that was on a particular record that we were able  
12 to put together in the time that we had. And Your Honor may  
13 recall that we did table the issue of the broader GEMS and DRE  
14 examination when we first raised it just as a matter of time  
15 and necessity to get what we could get to move forward in the  
16 time frame that we had.

17 I think the reality is: As we sit here, no one can  
18 say that this system is not compromised. And we have  
19 prospective relief. So if Dr. Halderman can do the analysis  
20 that Dr. Shamos has emphasized is needed before these machines  
21 are used again, he could do that relatively quickly. He is on  
22 the line, so he can talk to you about what that might involve.  
23 Then we can at least figure that out.

24 And to the point that Mr. Russo made, I just think it  
25 is not accurate as a matter of fact or law to say that there is

1 no relief to be had. Imagine the worst case scenario that  
2 Dr. Halderman finds that there is malware that is actually  
3 influencing the elections in the State of Georgia on the  
4 existing system.

5 With all due respect, Your Honor, I would hope Your  
6 Honor would agree that your existing order would not preclude  
7 relief that would be vital under the Constitution in that  
8 circumstance. The state would figure something out, whether it  
9 is hand-marked paper ballots or something.

10 Surely we all agree on this call that the state would  
11 have to figure something out, other than what would be in use.  
12 Maybe it is a remedy. But it is something. So we're asking  
13 for relief on an election that is going forward. And someone  
14 has got to do what has never been done and that Dr. Shamos said  
15 is critical.

16 Thank you, Your Honor.

17 DR. HALDERMAN: Your Honor, this is Alex Halderman.  
18 If I could make one more point --

19 THE COURT: No, you really can't. I've got just a  
20 threshold issue of really whether I'm allowing discovery and  
21 what the posture of the case is. And I think that is -- you  
22 know, that is really a legal issue as much as anything else,  
23 Dr. Halderman. I appreciate the marvelous resource that you  
24 provide to plaintiffs. But I don't think it is appropriate for  
25 me to hear from you at this juncture.

1 DR. HALDERMAN: Yes, Your Honor. Thank you.

2 MS. RINGER: Your Honor, if we may, this is Cheryl  
3 Ringer from Fulton County. I'm trying to make sure I  
4 understand the point, particularly since we have two elections  
5 going forward in 2019, September and November and a possible  
6 one in October.

7 Am I to understand that plaintiffs are now seeking to  
8 possibly have a renewed motion for preliminary injunction?

9 MR. CROSS: This is David Cross. I would say it  
10 depends on what happens. I mean, my hope is no. My hope is  
11 that we do an examination and that representations made by the  
12 state prove to be what is accurate.

13 The reality is nobody knows. So I would think all  
14 voters across the state would want to confirm that they are  
15 voting on a system that has actually been confirmed to be  
16 reliable.

17 MS. RINGER: And so Fulton County would submit that  
18 was the whole reason for us having the preliminary injunction  
19 hearing that we had. And we note that early voting has started  
20 today -- I'm sorry -- yesterday on our September election.

21 So any changes to what we are supposed to be doing  
22 would do, you know, harm to voters that are already out there  
23 using the system if you are proposing that we would change it  
24 at this late date.

25 MR. CROSS: I think we are putting the cart before

1 the horse.

2 MS. RINGER: It is. But actually we thought we had  
3 direction, and we're just not understanding that you want to  
4 change the direction that we were given. Thank you.

5 THE COURT: All right. I think that the only -- the  
6 thing I would like to just explore before I take the few  
7 minutes to think about what you've all said is that clearly it  
8 is suggested to me in the motion for clarification that the  
9 state filed that the state is determining whether it wants to  
10 appeal or not appeal. And, you know, this is sort of a  
11 triangulation in that decision between the state's wanting to  
12 figure out whether it wants to appeal and the plaintiffs saying  
13 on the other side, well, basically we might need more relief  
14 right now and if we don't know -- if we don't have a  
15 disposition of this case then there is no reason for us not to  
16 continue to be proceeding towards basically getting a final  
17 judgment -- final permanent injunction.

18 And that seems a little thornier in terms of if the  
19 state is not -- I mean, you know, the state obviously can  
20 decide what it wants to do. But if, in fact, it is going to be  
21 an open question, then, of course, it is understandable -- more  
22 understandable that the plaintiffs want to proceed -- figure  
23 out a mechanism so that they can get a more -- a dispositive  
24 ruling, though, you know, obviously what more exactly would  
25 have to be produced for that is a whole other question.



1 But that is -- Mr. Russo, that part of things -- the  
2 equation you didn't address. I don't know if there is anything  
3 more you want to say about it from that angle.

4 MR. RUSSO: Your Honor, this is Vincent Russo.  
5 Regarding the appeal, we're not -- we don't have the ability to  
6 say what direction our client will want to go, which is the  
7 reason for the motion for clarification. I do think though,  
8 however, that some of the issues raised in the motion for  
9 clarification would be more determinative of whether there was  
10 an appeal than the others.

11 And, Your Honor, I don't know even if we were to  
12 appeal that there would be a stay of the preliminary injunction  
13 anyway or that we would even seek one.

14 THE COURT: All right. So I'm going to take a few  
15 moments. And don't talk among yourselves because then I can  
16 hear it. So just talk -- if you want to speak with the people  
17 that you're present with, just go away from the phone and talk  
18 with them off that and put yourself -- then we'll be back in a  
19 few minutes. All right.

20 **(There was a brief pause in the proceedings.)**

21 THE COURT: Mr. Cross or -- this is a limited  
22 question for Dr. Halderman. So don't make -- don't construe my  
23 question as an opportunity to go beyond the scope of the  
24 question.

25 My question is this: Are you proposing that you're

1 going to sample a statistically significant representative  
2 range of the DRE machines in the jurisdictions where there are  
3 elections being held? Is that your proposal, or what is it?

4 MR. CROSS: Yes, Your Honor. This is David Cross.  
5 We have statistical experts that have been engaged in the case  
6 to address that. Certainly, they will work with Dr. Halderman.  
7 But Dr. Halderman is not a statistician.

8 But the short answer to your question is: We would  
9 want a statistical sample of DREs and memory cards of whatever  
10 set that is being rolled out for elections this year and then,  
11 of course, the GEMS servers as well.

12 And so our statistical experts would figure out what  
13 is an appropriate sample. Dr. Halderman would do the forensic  
14 analysis.

15 THE COURT: This is a very -- besides everything  
16 else, it is a very peculiar election. You know, you've got --  
17 you don't have anyone from Gwinnett. I'm not sure what it  
18 tells you in terms of your confidence building. Many of your  
19 major population areas have at best minor elections. You have  
20 lots of small elections in very small jurisdictions. So I'm  
21 not sure it is the -- it is meaningful for purposes of if you  
22 actually -- if your true anxiety is that this system may  
23 continue to live, it really may not tell you that much on that.  
24 It may. But I don't -- but it may not.

25 MR. CROSS: I guess two thoughts on that, Your Honor,

1 if I may. One is: These machines and the GEMS servers are  
2 going to get used this year. So at least looking at the GEMS  
3 servers would give us some insight into whether that aspect of  
4 the system has been compromised. And as Dr. Shamos agreed, if  
5 you compromise GEMS, you likely compromise everything. So at  
6 least getting that portion of it I think would be a critical  
7 step.

8 The other point that I would make -- and  
9 Dr. Halderman is better equipped to explain, but I understand  
10 the reasons you don't want to get into a lengthy discussion  
11 with him. So I'll give it my best shot.

12 The new system is not entirely new. There are  
13 aspects of the existing system that are going to continue to  
14 live even with the BMD system that would get rolled out. And  
15 so the concern that we have is if the current system is  
16 infected in any respect, certainly beyond just a handful of  
17 DREs or memory cards, of course, again, as Dr. Shamos  
18 acknowledged, those are penetration points to the broader  
19 system.

20 But if the current system is infected, whether it is  
21 in the voter registration database as a penetration point that  
22 was acknowledged or something else, that very likely has the  
23 potential to carry on into the BMD system because they are not  
24 building something entirely from scratch. And so that is a big  
25 concern we have.

1           Everyone needs to figure out now for the elections  
2           this year and going forward is the system compromised. It is a  
3           head scratcher to me that we don't all agree on that. But  
4           apparently we don't. It is not just about the 2019 elections.  
5           It is about the future elections as well.

6           THE COURT: All right. Well, to the extent it is  
7           about the voter registration database and the way -- and  
8           infection going forward, I'm willing to talk about that. And I  
9           had questions for the defendants because I was -- even on the  
10          record before because I was being told somewhat two different  
11          things about how they were going to proceed forward. And  
12          there's just some factual questions I have.

13          But I am just highly reluctant at this juncture to --  
14          though I recognize the merits of the plaintiffs' position as  
15          to, well, we still -- you know, it is not like your claims have  
16          been dismissed, so why can't you go ahead and do discovery  
17          but -- and potentially request again that on the eve of the  
18          election or in October or perhaps it is even in the end of  
19          September for other relief because you found contamination.

20          And I think I've given my level best here and I think  
21          that -- in terms of trying to figure out a way that respects  
22          the degree to which the jurisprudence in the area counsels  
23          against excessive intervention and at the same time counsels to  
24          ensure the protection of fundamental rights in the voting  
25          system.

1           And so to get involved with this messiness on a part  
2 of the system that is not going to proceed -- now, I can  
3 understand that we might -- that if -- if the state ends up  
4 having to use -- not be able to use the ballot marking device  
5 and is required to use some sort of hand ballot, it may end up  
6 needing to use the ballots created by the GEMS system. But  
7 those would be printed ballots.

8           So I'm not sure, you know, why I would have to worry  
9 about that. So it is a lot of resources still it seems to me  
10 and potentially sort of dragging me into a whole other  
11 preliminary injunction hearing come October revisiting issues  
12 that I have attempted to balance as best as I can in terms of  
13 equitable relief.

14           And I'm just -- and, you know, of course, I don't  
15 have anything from Dr. Halderman at this point telling me, oh,  
16 I also saw this and that and I have an affidavit from him where  
17 he's actually also reviewed the materials he does have, which I  
18 understood were very much a fourth choice on his part as a mode  
19 of looking at evidence of manipulation or hacking. But,  
20 nevertheless, I have nothing about that.

21           So I'm just -- I'm not sure where it gets us. I  
22 understand that from a policy perspective and from a protection  
23 perspective at the highest level one would say yes. But how  
24 would I pragmatically even operate come October if that were  
25 to -- you were to find some indication that in five counties

1 the machines were in some way infected or not functioning  
2 correctly?

3 I don't -- I can't even conceive of what I would do  
4 and whether I would say, well, I should infer that other --  
5 everything else is corrupted, which maybe I should. But, you  
6 know, this has been some degree of rough justice about this for  
7 sure.

8 MR. CROSS: Your Honor, this is Davis Cross, if I  
9 may. I think you are making exactly the right point. But I  
10 think it cuts in favor of doing it, and here is why for two  
11 reasons.

12 One, we're only at the discovery phase. So whatever  
13 relief might be needed down the road, as Rule 26 makes clear,  
14 doesn't drive the determination of whether we get the  
15 discovery.

16 The second point is I would say the more important  
17 practical point. The only way we end up in the world in which  
18 you are envisioning where Your Honor would have to figure  
19 something out late in the day is if the defendants are wrong  
20 and that the system is compromised. That is the only way we  
21 end up there.

22 And if we were in a situation where the defendants  
23 had come forward and said, we've had an independent expert look  
24 at this, examine it, and verify it, then we might be in a very  
25 different posture. Right. Because they would have something

1 to present to the Court and to the public to say we have a  
2 reasonable basis to believe that the system is secure and for  
3 voters to have confidence and now we're just quibbling over  
4 whether Dr. Halderman should do his own analysis. That would  
5 be a different posture. They would have, I would confess, at  
6 least a better position depending on the expert and what was  
7 done to push back and say the equities weigh against doing  
8 this.

9 But it is acknowledged by everyone that this has  
10 never been done. And so where it leaves us is going forward  
11 with an election this year and continuing to have some  
12 components of that going into a new system where no one has  
13 actually figured out whether anything coming out of that  
14 election is reliable and accurate.

15 And so I would say, Your Honor, I completely  
16 understand and share the concern. But that concern only arises  
17 if we find something. And that is really the perversity of the  
18 defendants' objection. If they are confident and they tell the  
19 public time and time again that this is a secure system, then  
20 they have no basis to object to an examination at all. They  
21 should say, great, come in, take a look, spend several weeks,  
22 we know what you're going to find, let's move forward.

23 The fact that they are objecting indicates to the  
24 Court that they do not have confidence, that they are worried  
25 something is going to get found here. And we can run it

1 together with Dr. Shamos if they want to have their own expert  
2 involved to make sure that they are comfortable with the way it  
3 happens. There are ways to do this.

4 But the mere fact that they are objecting is the very  
5 reason it should be ordered because it says they are not  
6 confident in their system.

7 THE COURT: Well, let's talk about right now the  
8 parts of the system that are going forward, and I will continue  
9 to think about what your argument is. And so let me have some  
10 questions for the state.

11 Originally I get -- I get notified that ES&S is going  
12 to no longer be housing the data for the voter registration  
13 database -- I'm sorry -- PCC is not going to be doing that and  
14 that -- and that the state itself will but that the  
15 application -- that you'll maintain -- the state will maintain  
16 the contract for the application and updates to the  
17 application.

18 So while I am writing the order, that is what I'm at  
19 first under the impression of. Then when I look at the  
20 contract with the new vendor, Dominion, there is clearly a  
21 provision instead for Dominion to run its software for the  
22 voter registration database and the ExpressPoll function.

23 And then -- there is also then we get the notice  
24 about the database being transferred. So I ask you-all which  
25 database it is. Because at this point I'm wondering. And the



1 state very clearly responds and says it is the voter  
2 registration database.

3 But -- so the order is drafted with that in mind,  
4 though I wasn't 100 percent sure still then why -- where the  
5 data was being housed and how did that all relate to the  
6 responses to PCC and the use of their software.

7 And I operated on the presumption you were not using  
8 the PCC software. But, in fact, you might be using it because  
9 of the fact that the contract provided for Dominion's software  
10 to be used. But maybe they are one and the same. That I don't  
11 know.

12 Clearly, the Fortalice evaluation indicated lots of  
13 issues about the software that PCC was using and access issues.  
14 And, obviously, that is something -- those are some issues that  
15 Dr. Halderman has raised. But I didn't know -- and I guess I  
16 operated on the -- on the face of the information that Dominion  
17 had its own software and so that all we were talking about was  
18 an infection through the database potentially, not through the  
19 software.

20 But I would think that, Mr. Russo, if you or one of  
21 your co-counsel could clarify this issue and how you are  
22 proceeding as to PCC's software and what does it mean -- are  
23 you permanently housing the data and that host of questions  
24 I've just laid out.

25 MR. TYSON: Yes, Your Honor. This is Bryan Tyson. I

1 think I can clarify some of those points for you. So  
2 initially -- you are correct -- the state is going to continue  
3 to use eNet, which is PCC's software, for the voter  
4 registration database going forward. The housing of all of  
5 that data and software into the Secretary of State's data  
6 center and the state maintaining control over that system will  
7 allow for the Dell SecureWorks, the other monitoring software  
8 that the state has in place, to work to protect the voter  
9 registration information that is present there.

10 THE COURT: Wait just one second. There is a word I  
11 didn't get. It will allow what to monitor? Dell you said?

12 MR. TYSON: Yes. I believe Mr. Beavers' testimony  
13 was there is Dell SecureWorks it is called is a monitoring  
14 system, along with Fortalice and others, that kind of police,  
15 as we talked about, the boundaries of the castle of the  
16 Secretary of State's network. So if an intruder was trying to  
17 get in, those systems would detect that. And that was the  
18 advantage of having that system housed in the existing data  
19 centers because it falls under the protection schemes that  
20 Fortalice had recommended.

21 So both the PCC software and the database will be  
22 housed in that environment and will be continued to be used.  
23 That system -- the voter registration system is separate and  
24 distinct from the -- not to get into far away from your  
25 question. But it is separate and distinct from the My Voter

1 page. It is separate from the online voter registration  
2 system, and it is separate from the electronic pollbook  
3 function that is used for election day and early voting  
4 operations.

5 So what happens for the Dominion system is at the  
6 time of an election a flat text file is taken out of the eNet  
7 system. And that flat text file contains the voters'  
8 information for all the voters in the state, along with the  
9 ballot combinations or the type of ballot that that voter is  
10 entitled to vote.

11 That information has to be matched up with the ballot  
12 combinations that are built in the new Dominion system. So  
13 there is going to be no connection between the prior GEMS  
14 ballot building process and the Dominion ballot building  
15 process.

16 But there has to be a reconciliation to be sure that  
17 if Bryan Tyson is entitled to receive this particular ballot  
18 combination in this particular county that that particular  
19 plaintiff ballot combination exists in the Dominion system for  
20 the ballot marking device so that it can generate that and also  
21 so that when the voter comes to check in at the ExpressPoll  
22 location that information can be reconciled -- not the  
23 ExpressPoll because it is the new devices, the Poll Pads. But  
24 those will be the devices that are used. So those are also  
25 populated with that information.

1 Under the new rules under House Bill 392 and the  
2 rules that went along with that, there has to be a malware scan  
3 of the information coming out of eNet. So that will be an  
4 important kind of sequence in that process. So whatever goes  
5 into the Dominion system will be coming through that.

6 But I want to make sure we're clear on the database  
7 itself that the Secretary of State is maintaining the data on  
8 its own server. That is separate and distinct from PCC  
9 maintaining the data on its server, which was the previous  
10 setup and the previous setup about which Fortalice was  
11 concerned.

12 So that's basically the interaction between those two  
13 systems. And I am sure I have created more questions in trying  
14 to answer yours. But I'll stop and see where we are.

15 THE COURT: So is that the permanent plan, or are you  
16 at some point planning to use Dominion software? Because I saw  
17 the provision for Dominion to be running an ExpressPollbook  
18 software. So that is why I'm still just trying to get that  
19 clarified.

20 MR. TYSON: Yes, Your Honor. So the e-pollbook  
21 software is the Poll Pad units, which will replace the  
22 ExpressPoll check-ins. So that is a distinct system. That  
23 governs the voter coming in and checking in. It is that  
24 system. That necessarily has to have information from the  
25 voter registration database in it. But that is different from

1 the voter registration database itself, which will remain  
2 housed with the Secretary of State's office.

3 So the database is the database. That is the thing  
4 that county election officials, county registrars, will update  
5 for individual voters as their information is updated. When it  
6 is time for an election, the database is not exported. But  
7 information from that database is used to populate the Poll Pad  
8 e-pollbooks that will be used to check in voters. So we'll be  
9 able to look up Bryan Tyson or Vincent Russo. Yes, you are a  
10 Georgia voter. Yes, you have not already voted absentee. You  
11 are eligible to go and generate a paper ballot off of the  
12 ballot marking device in the polling place.

13 THE COURT: Well, let me ask sort of a simple  
14 question sort of going back to the response that Mr. Barron  
15 gave both in the hearing, as well as in the interrogatory  
16 answers on behalf of Fulton County, about the way the software  
17 worked to pull up the last individual who had been referenced  
18 and how you could get stuck in the -- the poll worker you could  
19 say erred by looking at the statewide voter registration data  
20 system when looking for -- when looking for an individual  
21 rather than the precinct or you could say the software looked  
22 incorrectly and had this sort of misdirection.

23 Is that something that -- is the software that  
24 operates the Poll Pads -- will it have that same feature? I'm  
25 really not -- I understand you are saying it is a flat file of

1 information. But I'm not sure whether -- whether that is baked  
2 in to the way that the information is provided or not.

3 MR. TYSON: Yes, Your Honor. So the thing that  
4 Mr. Barron described -- and I'll be happy to let Ms. Ringer  
5 jump in as well. But basically the way e-pollbook -- the  
6 ExpressPoll itself was programmed when the software -- for  
7 example, when you click the red X in Windows, it closes the  
8 window that you currently have open. That is the way the  
9 software is written. That was the way that the user was  
10 interacting with data.

11 If you have looked up someone who is outside the  
12 precinct and don't follow the correct sequence that you are  
13 trained to do as the poll worker, the next voter will display  
14 information that is different than what should be displayed.  
15 So that was a user error issue.

16 That is limited to the ExpressPoll units. So the new  
17 Poll Pad units will still allow a poll worker to look up  
18 someone on a statewide basis because we want to provide that  
19 convenience for voters to direct them to the correct place.  
20 But it will be running -- this is not a correct analysis, but  
21 it is like a Windows versus a Mac. It is going to be running a  
22 different version -- a different type of software.

23 So I don't expect and we don't expect that there will  
24 be a similar user sequence for a lookup on the Poll Pads. We  
25 can get you some more information on that specifically, if you

1 would like it. But it is a completely different software that  
2 is accessing the information that has been exported from eNet  
3 into the e-pollbook software on the new system.

4 THE COURT: All right. Well, that was one of many  
5 concerns. But it didn't seem to me that the Fortalice reports'  
6 concerns regarding the integrity of the database -- of the  
7 voter database was -- and the software issues were limited  
8 simply to -- were as limited as you are indicating.

9 First of all, because of the scope of the exposure  
10 issues, they clearly had concerns about the integrity of the  
11 database that would be impacted. And that was one of the  
12 reasons why obviously I also ordered relief in this area.

13 So I'm hearing you say though that, well, just  
14 because we now have the database housed at the state, which  
15 also has had its own issues, it is safe and it is fine. But  
16 that sort of is inconsistent with what has happened with any  
17 requirement that you look at what has happened to the database  
18 thus far.

19 And it doesn't mean that there hasn't been some  
20 fundamental problems when you end up having also people being  
21 left out; people in the same home, husband and wife, being  
22 assigned to different precincts; or simply, in fact, malware  
23 having been inserted that would have eliminated or changed  
24 people's voting status.

25 So I'm not clear from what you are saying whether you

1 are thinking that the -- that kind of the remedy that you have  
2 implemented, which is we've brought the data into our own home,  
3 our own castle, that that is sufficient by itself. And I'm not  
4 clear also, you know, whether you are talking about the  
5 standard malware that one runs or anything more sophisticated  
6 than that as well.

7 But the first issue really is the data itself. I  
8 guess you are saying that you're not going to be using your  
9 software there -- but I'm not 100 percent sure -- that you've  
10 maintained from PCC to opt -- to manage the data. But if you  
11 are, there may be other issues of concern. Because I guess I  
12 would say I had thought from looking at the contract it was --  
13 that you maintained the option of using PCC but that you were  
14 planning to use Dominion's software instead. But I think that  
15 might have been an error.

16 MR. TYSON: Well, Your Honor, this is Bryan Tyson.  
17 If I could, maybe I'll try to make sure I've closed the point.  
18 I apologize for not being clearer on this.

19 The system that Dominion uses -- the Dominion system  
20 is replacing DRE and GEMS and ExpressPoll books. That is what  
21 that is replacing --

22 THE COURT: Right.

23 MR. TYSON: -- separate and apart from eNet and what  
24 is there. The security benefit that we get from bringing the  
25 database into the Secretary of State's environment is,



1 Number 1, we have been able to then take further control, the  
2 two-factor authentication for users, the having users time out  
3 over time. All of those are steps that are taken to address  
4 the security issues surrounding the voter registration  
5 database. So I don't want you to hear me say that the mere act  
6 of bringing it in the Secretary of State's office alone is what  
7 we believe is sufficient. There has been a continuing effort  
8 and will be a continuing effort to harden that, especially  
9 given the focus of Homeland Security and others on voter  
10 registration databases.

11 The other thing I think you should be aware of  
12 related to that is the Secretary of State's office has looked  
13 at the number of provisional ballots cast in 2018 versus 2016,  
14 which had similar turnouts of raw total voters, around 4  
15 million voters. There were about 21,000 provisional ballots  
16 cast in 2018, about 6000 in 2016. So there is an increase.

17 But almost the entirety of the increase was due to  
18 properly registered voters who were following the instructions  
19 of voter turnout groups to vote in a precinct -- a wrong  
20 precinct in their home county. So when a precinct was held  
21 open late, voters would be directed to -- say if you are a  
22 Gwinnett County voter and you have not yet voted, you can go to  
23 this precinct that will be open until 9:00 and cast a  
24 provisional ballot there.

25 Those ballots are then counted for all the races for

1 which the voter was eligible to do. That was all but about 100  
2 in terms of the raw vote increase in provisional ballots in  
3 2018.

4           So if there were widespread database problems in the  
5 voter registration database, we would expect to see a higher  
6 number of those kind of issues. The issues related to husband  
7 and wife being in different voting -- being directed to  
8 different precincts, those kind of issues -- those we have to  
9 look at really kind of on a person-by-person basis since the  
10 county registrar may have taken some action. If the husband  
11 had updated a driver's license or some other action had been  
12 taken, the voter may not have understood that that was also  
13 updating their voter registration record due to Georgia's  
14 automated voter registration system.

15           So there are some unique issues like those. But we  
16 obviously are extremely concerned about database security and  
17 will remain focused on that in the new system. But that really  
18 is unrelated to what is happening with Dominion and the  
19 system -- the new system that is being unveiled.

20           THE COURT: Well, I don't know what your plan is at  
21 this point to look at this. And I mean, it seemed to me that  
22 the record obviously is as I saw it. And I obviously  
23 identified the variety of concerns and regardless of the -- I  
24 don't know what -- I am going to assume and take you at your  
25 representation as to your analysis of the provisional ballots.

1     However, I will say that also there was a lot of evidence as to  
2     people not being able to cast provisional ballots or being  
3     discouraged from doing it and giving up.

4             So this is a many-headed monster in some ways. But  
5     the point really is -- where I started was I really wasn't sure  
6     how you were proceeding from -- because of the two sources of  
7     information as to -- that suggested that you were possibly just  
8     giving it over to Dominion to completely handle or possibly  
9     keeping it on your own. So I tried to write it to accommodate  
10    either possibility.

11            I would have been a little bit more specific if I had  
12    known for sure. But I think that it was -- the state was not  
13    100 percent clear about this, frankly. And it was something we  
14    didn't go into in as much depth as probably would have been  
15    helpful. But it was late on the last night of the hearing.

16            Is the state planning to have its contractor follow  
17    my order and have Fortalice do more work on this issue? Or are  
18    you only looking at -- and I think that is a really important  
19    thing to me to understand what are you planning. And I know  
20    you wanted to know what you were -- I was expecting. But I  
21    think the first threshold issue is what is -- how are you  
22    planning to use your contractor in this regard.

23            MR. TYSON: Your Honor, this is Bryan Tyson. I don't  
24    know that all of those decisions have been made quite yet.  
25    Mr. Russo obviously can fill me in on that. I know the state

1 obviously plans to comply with the order.

2 We asked the questions we asked to try to make sure  
3 we had a good grasp on those points. But I don't think the  
4 decisions have been made yet in terms of exactly what we're  
5 going to do. We obviously plan to follow your order.

6 THE COURT: All right. Well, one of the questions  
7 that you asked was -- the quite simple question of are you  
8 going to -- is the state required to file its plan to deal  
9 with -- address the voter registration information and database  
10 on the docket.

11 And I didn't provide for that because I actually was  
12 trying to encourage you-all to have conversations with  
13 plaintiffs' counsel about this. And, you know, it was not that  
14 I was thinking I was going to be actively engaged unless there  
15 was evidence that you hadn't done it in good faith and had  
16 made -- and made -- and had a true plan for proceeding that you  
17 had also shared with plaintiffs and had dialogue about.

18 But -- and that is why I'm just also trying to  
19 clarify where we're at. I didn't perceive myself as having,  
20 you know, weekly monitoring or anything like that. But I was  
21 hoping to encourage better communication and dialogue about the  
22 plans and things that might, in fact, address some of the  
23 plaintiffs' concerns and hoping to avoid the tenor of the  
24 conversation that seemed to manifest itself in the  
25 correspondence apparently that I didn't need to have part of

1 but that was part of the submissions that were provided to me.  
2 There was very bitter communications on both parties' side --  
3 all parties' side.

4 So because I do understand how this can keep on  
5 moving -- keep on going, going, going. But I don't -- it is  
6 not my role to be at this juncture monitoring. On the other  
7 hand, I do have an obligation to make sure that the injunctive  
8 relief is -- ultimately that it is implemented in good faith.

9 So I guess that is my answer to the question you  
10 posed. I was not expecting it to be filed. But I was  
11 certainly trying to encourage -- I did require you to share it  
12 with the plaintiffs' counsel. And the purpose for that was so  
13 that you could actually have some true dialogue and  
14 communication about it and hoping that would move us forward as  
15 well.

16 With respect to the state's question as to what were  
17 the precise requirements for -- as to the filing -- are state  
18 defendants to file the referenced rules -- that is Number 2 in  
19 your motion for clarification -- when they are made available  
20 for public comment or after they have been promulgated and  
21 adopted.

22 This was really so that I would have notice of really  
23 what you were doing. Just simply if you were putting up  
24 proposed rules for comments, I would like to know that. And  
25 that is just -- it is not that I'm expecting that I'm going to

1 jump in and give any comments. But it will give me notice of  
2 what is going on.

3 I don't want to be having to have the court librarian  
4 maintain a Google alert for when you are doing it since it is  
5 easy enough for you to file it. This is a matter of public  
6 record, and that is the same thing for when your rules have  
7 been adopted.

8 But I am not myself intending at this juncture to do  
9 a substantive review of the proposed regulations as part of  
10 this litigation unless it somehow becomes a part of the  
11 litigation for the BMDs in some way. But I mean, there are  
12 other mechanisms obviously that the interested parties can do  
13 that. But to the extent that auditing is a central part of  
14 whatever you are doing, it is obviously of some concern to the  
15 Court. But I'm not the reviewer of the regulations. But it is  
16 relevant to the litigation. I hope that answers that question  
17 to your satisfaction.

18 I have answered Question 3 regarding the plan being  
19 filed. I mean, obviously I know that if the plaintiffs think  
20 that you haven't done it in good faith they are going to file  
21 the plan. Or you may want to file the plan to show that you're  
22 in good faith compliance and the process that you have gone  
23 about. But that is up to you.

24 And if the plaintiffs don't think you have, then that  
25 is up to them whether they are going to file it. But I am

1 trying not to put myself in a monitoring -- an independent  
2 monitoring role.

3 If something comes up and I have to have an actual  
4 hearing about something -- relief not being entered, that is  
5 another matter. But I'm not independently monitoring. We're  
6 already discussing the question of Number 4.

7 I have one question about the -- that I wanted to  
8 understand. The scanners in the Dominion system that you're  
9 planning to purchase, are those scanners -- the ones at the  
10 precinct level, are they able to scan a -- the full ballot for  
11 counting purposes, if that was necessary?

12 MR. TYSON: Your Honor, this is Bryan Tyson. Yes.  
13 The precinct scanners from Dominion are the more advanced  
14 technology scanners that we had discussed in the hearing. And  
15 just so you're aware, Dominion equipment has already started  
16 arriving in Georgia. We're on the -- there is some in the  
17 Secretary of State's warehouse already that is being prepped  
18 for acceptance testing. So that process is well underway. But  
19 they are the precinct scanners that will take a full image of  
20 the ballot for processing.

21 THE COURT: So if you ended up having to have a hand  
22 ballot, they would be able to count a hand ballot?

23 MR. TYSON: Yes, Your Honor. They could be  
24 programmed to count a hand ballot or programmed to count a  
25 ballot marked device ballot. That is correct.

1 THE COURT: All right. And you also asked in  
2 Question 1, regarding the pilot project required at  
3 Document 579 on Page 148, Paragraph 2, does the requirement to  
4 implement a pilot election November 2019 utilizing hand-marked  
5 paper ballots include all advanced in-person voting or is it  
6 limited to election day voting.

7 It includes the whole process. The advanced  
8 in-person voting. So you get a full run-through.

9 Have you been able to identify three potential  
10 counties or jurisdictions alternatively?

11 MR. RUSSO: Yes, Your Honor. This is Vincent Russo.  
12 The pilot project counties are -- as we understand them, are  
13 currently to be Carroll, Catoosa, Bartow, Decatur, Paulding,  
14 Lowndes. There is a potential that Bacon and Treutlen will  
15 also be included. We understand that they are -- will be  
16 attending the training. But it is not definite whether they  
17 will be pilot project counties.

18 And then Cobb County -- we understand that they have  
19 agreed to do a hand-marked paper ballot pilot in four cities.

20 THE COURT: So you are basically saying the Cobb  
21 County running of the -- of the hand -- Cobb County will run  
22 the pilot project for hand ballots in the four cities -- the  
23 four -- use those as four jurisdictions?

24 MR. RUSSO: Yes, Your Honor. I misheard you. I was  
25 giving you the full overview on both pilots. But that is



1 correct.

2 THE COURT: And do you know what cities those are?

3 MR. RUSSO: Let me check my email. I asked that  
4 question. Yes. It is Smyrna, Austell, Powder Springs, and  
5 Kennesaw.

6 THE COURT: All right. Thank you.

7 MR. RUSSO: You're welcome.

8 THE COURT: Have I addressed the state's questions?

9 MR. TYSON: Your Honor, this is Bryan Tyson. Yes, I  
10 believe that answers all of our questions except for the fourth  
11 one, which I know we're still talking through that. But yes,  
12 that is very helpful and we appreciate that very much. Thank  
13 you.

14 THE COURT: I want to bring one point to your  
15 attention, which is it may be that the Secretary of State was  
16 frustrated or his spokesperson. But I don't think it is  
17 helpful for him to be -- a representative of the Secretary of  
18 State's office -- they are free to say whatever they want to  
19 say. But I don't think it is helpful in this process for a  
20 representative to be saying all of this is silly and just  
21 rhetorical. You know, they are free to say what they want.

22 But it doesn't inspire confidence that we're going to  
23 be able to collaborate. That is my focus is being able to  
24 resolve these issues. But I hope that that is not  
25 representative of a different viewpoint on their part.

1           And I don't know who has reviewed anything within the  
2     department. But I would say that -- as Dr. Halderman pointed  
3     out, that the Court -- it is a minor, minor thing in the larger  
4     scheme of things. But the Court identified this problem of  
5     getting a bad voter -- bad website message that you do not  
6     proceed on the My Voter page at Document -- on the order at  
7     Footnote 59. And it still remains. The same -- you pull it  
8     up, and the same thing happens. It doesn't matter what browser  
9     you use.

10           MR. CROSS: Your Honor, this is David Cross. Could I  
11     offer one thing?

12           THE COURT: Yes.

13           MR. CROSS: On Question 4, the debate raised about  
14     discovery, Your Honor made a good point earlier, which reminded  
15     me. We actually have not put into the record some of the  
16     disconcerting anomalies that Dr. Halderman found in the GEMS  
17     databases. I'm wondering if we could have an opportunity,  
18     understanding Your Honor is struggling with what the right path  
19     forward is with respect to discovery, whether there is any at  
20     all -- if we could have an opportunity this week to put in just  
21     a concise filing including a declaration from him that details  
22     things.

23           Just to give Your Honor an example, one of the things  
24     we did discover is that there are discrepancies between the  
25     vote totals that were reported for certain counties and the

1 actual number of votes cast that was reflected. In their  
2 numbers, over a thousand in some counties. Meaning they are  
3 reporting in some counties 1600 more votes totaled in terms of  
4 the election results than actually show up as votes cast in the  
5 GEMS databases for those counties.

6 And so he's done some preliminary analysis, and that  
7 is at least preliminarily what we found. If it is helpful to  
8 the Court, we can put in a declaration that provides more  
9 factual predicate for why we think the examination that we're  
10 asking to do is important.

11 THE COURT: You can submit that.

12 MR. CROSS: Okay. Thank you, Your Honor. We'll do  
13 that as soon as possible this week.

14 MR. RUSSO: Your Honor, this is Vincent Russo. We  
15 would just ask if that is okay that we respond to whatever is  
16 submitted.

17 THE COURT: Of course. Just --

18 MR. BROWN: Your Honor, this is Bruce Brown.

19 THE COURT: I'm sorry. Just one second.

20 Since -- so we don't end up eating up too much time,  
21 if they file it this week on Friday, when would the state want  
22 to be able to file something in response by?

23 MR. RUSSO: Your Honor, we would ask until the  
24 following Friday.

25 THE COURT: All right.

1 MR. RUSSO: We have a response to their motion for  
2 leave due this Friday.

3 THE COURT: All right. Mr. Brown?

4 MR. BROWN: Thank you, Your Honor. Circling back to  
5 one issue that I wanted to make sure that I presented clearly,  
6 because it may relate to several of these issues, in our status  
7 report the issue -- one of the issues that we raised was the  
8 possibility that in 20 -- for the 2020 elections that proceed,  
9 the presidential preference primaries in March -- that would be  
10 elections in January, February, and March.

11 THE COURT: What are those? I looked at the  
12 Secretary of State's page, and I didn't see any identified.

13 So what are those?

14 MR. BROWN: Every year there are a slew of special  
15 elections in January and February that are not on the Secretary  
16 of State's -- anticipated on the Secretary's web page. And we  
17 have some data on that. I do not have it in front of me. I  
18 think we probably submitted it as evidence in the hearing.  
19 Although I can't cite to it this second.

20 But there are special elections -- my understanding  
21 is there are special elections throughout the state in January  
22 and February as they come up every year. And the reason why  
23 that is -- that may be important is that -- and this could go  
24 into the pilots in November '19 as well. If and to the  
25 extent -- first, of course, paper ballots will be used for

1 those elections because those are -- that is required under  
2 your order. Of course, that is certainly what we asked.  
3 There's not a quarrel with that.

4 The issue is the ballot building infrastructure that  
5 is used to print those ballots and to build those ballots and  
6 ultimately to scan them and tabulate them. Currently, that is  
7 done by the GEMS system. Your order contemplates that after  
8 January 1, 2020, that infrastructure, which is the ballot  
9 building and the scanning tabulation, will be done by the  
10 state's new system. There is the possibility that the state's  
11 new system will not be ready either because of certification or  
12 because of the delays that -- it is a tight schedule, et  
13 cetera, given the complexity of the implementation.

14 And so there is a little bit of a gap, if you will,  
15 or potential gap in the coverage of your order as to what will  
16 be the infrastructure for implementing the hand paper ballots.

17 In our status report, what we're suggesting is that  
18 provided -- this is a gigantically important proviso. Provided  
19 there are robust audits, hand-marked paper ballots may safely  
20 be used with the existing GEMS infrastructure, which composes  
21 the ballots and gives the print orders to the printers for  
22 those ballots.

23 And then after the votes are hand marked actually  
24 using the AccuVote scanners, like I said, if the new scanners  
25 are not available. And so anticipating that, the state should

1 be on notice that if the new system is not going to be  
2 available to use with the hand-marked paper ballots, then they  
3 are going to need to have something.

4 And what we're suggesting is, again, provided there  
5 are robust audits, which will be used with the artifact of the  
6 voter's choice, because you will have hand-marked paper  
7 ballots, that the old GEMS systems could be used. However, I  
8 think this underscores sort of the live nature of the case in  
9 that we need to get to the truth of what the GEMS system and  
10 the DREs actually are infected with, if anything. But that is  
11 what we --

12 **(Unintelligible crosstalk)**

13 THE COURT: Well, listen, first of all, you could  
14 obviously have this conversation between yourselves. If there  
15 is something that is a reasonable modification -- if you need  
16 the ballot builder to print ballots, then I mean that is -- to  
17 print the ballots to be done by hand, that is a simple enough  
18 thing. You're not worrying about what happens then.

19 I don't know what the -- if they have -- you know,  
20 the whole question about the AccuVote scanners and how they  
21 count, et cetera, and do they have them, that is a whole other  
22 question. Those are -- I mean, those are things that you could  
23 all explore, and I would hope you might rather than having to  
24 come on an emergency hearing if there are, in fact, elections  
25 that they are not ready to handle in January, February, and

1 March.

2 That is why I'm trying to give you some mechanisms  
3 all to talk to each other and not to have to be coming always  
4 here. But --

5 MR. BROWN: Your Honor, we hear you loud and clear.  
6 And in our submission, I suggested that we be able to talk with  
7 the state defendants. I wanted to raise that today since we  
8 are having this thing. But we will do so.

9 THE COURT: All right. All right. So you can -- the  
10 plaintiffs may submit additional information about the results  
11 to the extent he's completed -- Dr. Halderman's review of the  
12 GEMS database and any outstanding issues that he would want to  
13 review in the hardware. The defendants may respond the  
14 following Friday.

15 So we're talking about this Friday and the following  
16 Friday. And I am not sure that my position has changed very  
17 much. But if you actually do have a -- if your statisticians  
18 actually have already their statistical proposal, you can  
19 provide it. If not or if it is going to take a lot more work,  
20 I would not bother if I were you.

21 I have really my major concerns about our going down  
22 this pathway. But if it is already done, that is something  
23 else. I just don't think it is useful. I'm more concerned  
24 about the database at this point that is going to continue --  
25 clearly going to continue on, no matter what, in terms of the

1 the voter database.

2 And I do encourage you-all to continue talking. I  
3 didn't get a very clear idea about what -- what the state is  
4 thinking about at this juncture. But I realize it has not been  
5 very long since I issued the order and there are a lot of  
6 moving parts.

7 But I will say that the requirement that you use your  
8 consultant to be involved in looking at this was to have, in  
9 fact, a genuine, fulsome review of the issues raised. And I --  
10 it would require likely other analyses. That was my thought of  
11 what you were going to be doing with the assistance of your  
12 expert. And I saw that, in fact, in many different ways  
13 Fortalice had not been able to do the complete type of analysis  
14 it thought was essential as to the database and that there were  
15 limits to looking at anything only from the perspective of the  
16 castle perimeter and that they hadn't been able to focus the  
17 way they would have if they had been authorized to do so.

18 So that was my expectation. But, you know, I also  
19 thought it was something that you were -- with the proper  
20 incentive would do -- were well capable of doing and guiding.  
21 And counsel would be able to make sure it happened. At least  
22 that is the hope.

23 So I think that those issues in terms of how they  
24 have a continuing impact are the ones that are the greatest  
25 concern to me in terms of the old -- what gets carried forward



1 from the old system to the future. And the Court is future  
2 focused.

3 Tell me what the schedule -- the schedule exactly is  
4 on the state's response to the motion to amend the complaint.  
5 I haven't really tried to plot it out. When is the briefing  
6 going to be complete?

7 MR. RUSSO: Your Honor, this is Vincent Russo. Our  
8 response is due -- state defendants' response is due this  
9 Friday.

10 THE COURT: All right. The plaintiffs' reply?

11 MR. RUSSO: I didn't actually calculate their  
12 deadline.

13 THE COURT: That is fine. I can figure it out.

14 All right. Many different things were provided to  
15 me. Is there something else that I missed in your papers? I  
16 know that I had Dr. Halderman's affidavit. I had the Coalition  
17 plaintiffs' status report. And we discussed some part of that  
18 and in particular about the use of the GEMS system and the  
19 AccuVote scanners.

20 But is there anything else that you-all wanted to  
21 discuss?

22 All right. Well, hearing nothing, I am going to  
23 assume not. Because I know all of you are very capable of  
24 making 5 million points. So I'll look to the submissions on  
25 Friday -- this Friday and the following Friday.

1 I had one last issue myself, which was about the  
2 servers. I just wanted to understand what the basis of -- what  
3 was happening about the servers. Have they first of all been,  
4 in fact, picked up? The copies of the servers from the FBI  
5 that is.

6 MR. BELINFANTE: Your Honor, this is Josh Belinfante.  
7 The FBI has delivered the servers to our office. They are now  
8 with a forensic expert of the plaintiffs. We have made -- we  
9 had all agreed that they would copy the hash information, which  
10 as I understand it is the way you can tell if after that  
11 anything had been changed.

12 There was a misunderstanding on Saturday. There was  
13 an email sent around asking whether that could be copied. I  
14 took it to mean the hash information. The plaintiffs took it  
15 or were intending for it to mean the actual image itself. So I  
16 agreed to it thinking it was the hash information, even though  
17 on just the day before we had all agreed that it would be just  
18 the hash information.

19 And so there is a copy now with the expert. The FBI  
20 drive is with the expert. And we had agreed to not provide it  
21 to either party unless and until we had some further guidance  
22 from this Court on the scope of the remaining discovery issues.

23 MR. BROWN: Your Honor, this is Bruce Brown. We will  
24 be submitting pursuant to your standing order a summary of the  
25 dispute and the positions of the parties on that issue probably

1 today. And that will tee that issue up. The issue there is  
2 whether we can look at it or whether the plaintiffs' experts  
3 can review the FBI image, which is a copy of the original CES  
4 image that the state ended up destroying. And so it is highly  
5 relevant for the reasons that will be apparent anyway but also  
6 as explained in our submission.

7 THE COURT: All right. It is a joint submission  
8 though?

9 MR. BROWN: It is.

10 THE COURT: All right. Well, then I'll deal with it  
11 when it gets here. All right.

12 MR. BROWN: Thank you, Your Honor. Thank you for  
13 your time today.

14 THE COURT: All right. Thank you, everybody. Have a  
15 good day.

16 MR. CROSS: Thank you.

17 MR. RUSSO: Thank you.

18 MR. TYSON: Thank you, Your Honor.

19 **(The proceedings were thereby concluded at**  
20 **12:22 P.M.)**

21

22

23

24

25

## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 59 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 28th day of August, 2019.

*Shannon R. Welch*

SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT